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June 11, 2003

Ex Parte

William Maher
Chief, Wireline Competition Bureau
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

re: Verizon Petition for Reconsideration, Reinstatement of CC Docket No. 94-147

Dear Mr. Maher:

As Verizon demonstrated in both its Petition for Reconsideration and its Reply, the Commission's termination of CC Docket No-94-147¹ was an exercise of judgment or discretion, not a clerical or ministerial action. Even if the judgment was erroneous — that is, even if it was the product of staff neglect, inadvertence, or simple mistake of fact — the error was not the kind of transcription or calculation error that the courts have allowed agencies to correct after an order has become final and non-appealable. *See* Petition for Reconsideration at 10-11; Reply in Support of Petition for Reconsideration at 8-9. In a recent order the Commission has reaffirmed that underlying legal analysis, relying on its own established precedent.

In particular, the Commission has repeatedly held that its authority to revisit final action is confined to transcription or calculation errors and may not be used to correct an error of judgment or discretion. And, as discussed below, the Commission reaffirmed this rule in a unanimous decision by the full Commission just last week.

The leading example of the cases in this line of authority is *County of San Mateo, California*, Memorandum Opinion and Order, 16 FCC Rcd 16501 (2001) ("County of San Mateo"), which involved circumstances parallel to those at issue here. In that case, Champion

¹ *Termination of Stale or Moot Docket Proceedings*, Order, 17 FCC Rcd 1199 (2002) ("*Termination Order*").

Communications Services, Inc. (“Champion”) filed an application for a new license to operate on a particular frequency pair in the San Francisco/Oakland area. Several months later, the County of San Mateo filed an application to modify an existing license by adding the same frequency pair within the same area that was the subject of Champion’s application. Apparently overlooking the pendency of Champion’s prior conflicting application, the Licensing and Technical Analysis Branch of the Public Safety and Private Wireless Division granted San Mateo’s requested modification. The Branch later granted a second modification application by San Mateo to add the same frequency pair at another site, likewise within the same area. Champion failed to seek reconsideration of the Branch’s actions granting San Mateo’s applications, and the grants accordingly became final.

More than five months after it had granted San Mateo’s second modification application, the Branch acted *sua sponte* to set aside its grants. It explained that it had just become aware that, in violation of the Commission’s rules, it had processed San Mateo’s applications ahead of Champion’s prior conflicting application. Thereafter, on San Mateo’s application for review, the Commission reversed the Branch’s set-aside decision, and reinstated the grants of San Mateo’s modification applications, on the ground that action taken pursuant to delegated authority may be set aside *sua sponte* only within 30 days. *County of San Mateo, California*, Order on Review and Reconsideration, 16 FCC Rcd 4291, ¶ 8 (2001) (“The Branch was not authorized to rescind its decisions after the respective thirty-day periods had elapsed. Thus, each grant was final thirty days after the date of its grant, and the Branch’s . . . rescission is invalid.”).

Champion sought reconsideration of the Commission order. It argued, just as WorldCom and AT&T argue here, that the Branch’s grant of San Mateo’s applications was an “inadvertent error” that the Branch was free to correct even after the time for reconsideration had expired. *County of San Mateo* ¶ 7. The Commission disagreed. It concluded that “the ministerial error doctrine does not extend to the present matter.” *Id.* The Commission explained that its “authority to revisit final actions . . . extends only to the correction of clerical or administrative errors that underlie or occur in the process of taking an action, ***such as a mathematical miscalculation, or a license that omits or misstates a frequency, or a document that omits an intended party or provision.***” *Id.* ¶ 8 (emphasis added). “The taking of an erroneous action, itself, is not generally a ministerial error that can be corrected after the 30-day period has elapsed under 47 C.F.R. § 1.113(a).” *Id.* Because “the decision to grant a license application generally is ***a discretionary, rather than a ministerial, action,***” the Branch was without power to correct its erroneous grant of San Mateo’s applications after the reconsideration period had expired. *Id.* ¶ 10 (emphasis added).

The Commission reiterated this fundamental rule in an order released only a few days ago: “The Commission may correct erroneous grants of applications *sua sponte* more than thirty days after they become final only where the grants occur because of, or contain, a ministerial error. The Commission’s authority to revisit final actions is limited to the correction of clerical errors that underlie or occur in the process of taking action, such as a mathematical miscalculation, or a license that omits or misstates a frequency, or a document that omits an intended party or provision.” *California Water Service Company*, Memorandum Opinion and

Order, FCC 03-118, FCC File Nos. 0000079079 *et al.*, ¶ 18 (rel. June 3, 2003) (emphasis added; footnotes omitted).²

In contrast, an example of the type of ministerial error that *can* be corrected at any time is *Robert Fetterman d/b/a RF Communications*, 16 FCC Rcd 8221, ¶ 5 (2001). In that instance, the Commission found that the omission of a frequency from a construction permit was a “clerical error” that failed to reflect the Commission’s substantive decision to authorize operation on that frequency, as clearly expressed in a prior Public Notice. *See also Hazle-Tone Communications, Inc.*, 13 FCC Rcd 1547, ¶¶ 10-11 (1997) (correcting “clerical error” in recording on a license a frequency different from the one specified in the Public Notice granting the license application). Similarly, the Commission ruled that it could reimburse parties for overpayments made as a result of the Commission’s mathematical error in calculating the amounts due for broadband PCS licenses. *See APC PCS LLC*, 13 FCC Rcd 23750, ¶ 6 (1998). What these cases have in common — and what distinguishes them from *San Mateo* and *California Water* — is that the errors at issue involved not a mistake of substantive judgment but rather a ministerial transcription or calculation error of the sort that might be made by a clerk or stenographer.

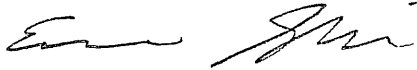
These Commission decisions, together with the additional agency and judicial precedents cited in those orders, strongly support Verizon’s Petition for Reconsideration and refute the arguments on which WorldCom and AT&T have relied in opposing reconsideration. The Commission’s orders make clear that, if the agency has terminated a proceeding in an order that has long since become final and non-appealable, it has no power thereafter to reinstate the proceeding on the theory that the termination was based on a substantive error. Terminating a proceeding, no less than granting a license application, is “a discretionary, rather than a ministerial, action.” *County of San Mateo* ¶ 10. That point is reinforced by the text of the Commission’s *Termination Order* itself, which states in clear terms that “[w]e have reviewed the docket proceedings listed in the appendix, **and have determined** that the dockets should be terminated.” *Termination Order* ¶ 1. That language confirms that the Commission made a considered judgment, well within the scope of its discretion, to terminate each of the proceedings listed in the appendix, including CC Docket No. 94-157. That judgment may have been the product of a staff mistake or inadvertent oversight, akin to the Branch’s oversight in granting San Mateo’s application, but that does not make the judgment a clerical or ministerial error — “such as a mathematical miscalculation, or a license that omits or misstates a frequency, or a document that omits an intended party or provision,” *County of San Mateo* ¶ 8 — of the sort that the Commission may correct even after the time for reconsideration and appeal has expired.

Accordingly, as the Commission’s own precedents dictate, the Bureau must set aside its *Reinstatement Order*.³

² *See also id.* ¶ 22 & n.95 (refusing to revisit a prior ruling because “no entity sought reconsideration,” the “decision is final,” and the ruling was not based on a clerical error “such as a mathematical miscalculation, or a license that omits or misstates a frequency, or a document that omits an intended party or provision”).

³ *Stale or Moot Docketed Proceedings*, Order, Notice, and Erratum, CC Docket No. 94-157, DA 03-488 (rel. Feb. 25, 2003).

Sincerely,

A handwritten signature in black ink, appearing to read 'E. Shakin', with a stylized flourish at the end.

Edward Shakin
Vice President & Associate General Counsel

cc: Sharon Diskin
Laurel Berghold
Debra Weiner
Jeff Carlisle
Joshua Swift
Tamara Preiss
Andrew Multz
Aaron Goldsmidt
Chris Libertelli
Matt Brill
Dan Gonzalez
Jessica Rosenworcel
Lisa Zaina